IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2621 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE A.S.DAVE

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-Yes.**

2 To be referred to the Reporter or not ? **-Yes.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-Yes.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ? **-No.**

==========

AHMEDABAD GHANTI MALIK MANDAL - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

==========

Appearance :

MR PRABHAKAR UPADYAY, Ld. Advocate for Petitioner(s) : 1,
Shri Kamal Trivedi, Ld. Ad. Gen. with Ms Sangita Vishen, Ld. AGP for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 1 - 2.

==========

CORAM : HONOURABLE MR.JUSTICE A.S.DAVE

Date : 18/10/2007

ORAL JUDGMENT

1. This petition under Article 226 of the Constitution

of India is filed, challenging the circular dated 26/7/2006 along with letters/orders dated 8/1/2007 and 9/1/2007 issued by the concerned respondents herein whereby the owners of various Attachakkis' are directed to mix powder of iron and folic acid in the flour of food-grains for the purpose of fortification, mainly on the ground that such orders/instructions are unauthorized, illegal, arbitrary, unreasonable and violative of fundamental rights conferred upon the petitioner mainly under Article 14 and 19(1)(G) of the Constitution of India.

2. Petitioner is an association, registered having registration No.G-1293 and the association has taken up the cause on behalf of its members. It is the case of the petitioner herein that all the members of the petitioner association are grinding food-grains and by impugned circular and orders/letters, the respondent authority has exercised power contrary to law and directing the members of the petitioner association to perform the duties not envisaged by any statute or law time

being in force. According to the petitioner, the members of the petitioner association cannot be compelled to get registration from the respondent-authority, at the same time cannot be forced to mix the iron and folic acid in the flour, since such an act on their part will result into breach of provisions of other statute in existence.

3. The following main contentions are canvassed by the learned advocate appearing for the petitioner that the provisions of the Gujarat Essential Articles Dealers (Regulations) Order, 1977 (for short 'the order of 1977') are not applicable to the members of the petitioner association, as they are not dealers as per the definition given in Section 2(4) of the order of 1977, since the owners of Attachakkis' do not fall within the purview of the order of 1977. They are neither the manufacturer nor stockist of the food and therefore, they are not required to be registered. Sub-Section 4 of Section 2 defines the definition of dealer which reads as under:

"Dealer" means a person who whether for commission, remuneration or otherwise and whether or not in conjunction with any other business, carries on the business of purchase, sale, storage for sale or manufacture, of any essential articles and includes his representative or agent, but does not include-

(a) for the purpose of all clauses except Clauses 3 and 4 of this order a person in relation to any essential commodity in respect of which he holds or is required to hold a licence or as the case may be, an authorisation under any order for the time being in force, issued by the State Government under Section 3 of the Essential Commodities Act, 1955.

(b) an agriculturist who stores and sales essential articles produced by him by personal cultivation and does not engage in the business of purchase, sale or storage for sale or any essential articles not produced by him

by personal cultivation;

(C) a hawker of a pedlar;

4. In view of the above definition of 'Dealer', it is submitted that members of the petitioner association cannot be said to be dealer as they are grinder of various grains.

5. Second contention raised by the petitioner is that direction issued by the respondent-authorities by issuing impugned circular and orders/letters of mixing powder of iron and folic acid will be contrary to the provisions of Drugs and Cosmetics Act, 1940 and Rules made there under (for short Act of 1940), since iron and folic acid will be covered under definition of Drug as defined under Section 3(b) and 3(b)(iv) of the said Act. It is also submitted that the members of the petitioner association will have to obtain licence under Section 18 of the above Act, otherwise they will be subjected to penalty as provided under Section 27 of the said Act and therefore, the directions

impugned required to be quashed and set aside.

6. It is also submitted that the impugned circular and orders/letters issued are for extraneous consideration and with an ulterior motive so as to benefit one pharmaceutical company namely Nikolas Piramal Pharma Co. which is unfair, improper and contrary to law and there is no public interest involved in issuance of such directions.

7. Inter alia it is also submitted that in case if State Government is inclined to carry out its obligation contained in part-IV of the Constitution of India namely Article 47, in such a case, the State must provide iron and folic acid at free of cost to public at large and no instruction can be given to the Attachakki owners, dehors the law.

8. The above submissions of the learned advocate appearing for the petitioner are controverted by Shri Kamal Trivedi, learned Advocate General appearing for the respondent authorities and it is submitted that the petition at the behest of an

association is not to be entertained in as much as no certificate of registration under the statute is produced and no details about the registered members is furnished. Learned Advocate General submits that it is a policy decision taken by the State authorities so as to improve health related problems of the people, especially the women and children by providing nutrients and therefore, instructions are issued to owners of the flour mills, at the same time owners of Attachakki to mix powder of iron and folic acid with wheat flour, after taking into consideration various opinion of experts, survey carried out at the behest of World Food Programme (WFP) and as per the directions contained pursuant to the report of the committee headed by the former Judge of the Hon'ble Supreme Court (Hon'ble Mr. Justice D.P.Whadhwa), constituted pursuant to the order passed in Writ Petition (Civil) No.196 of 2001 and recommendations made therein, this Court in exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India may not interfere in such case of policy decision by the State Authority,

taken in larger public interest.

9. Learned Advocate General has also taken this Court to the definition of Clause-2 (5) of the order of 1977 which defines Essential Article which means any of the articles specified in Schedule-I to the order of 1977 and entry numbers 1 to 9 of clause A to the aforesaid schedule, include wheat and Atta. The learned Advocate General also relies on definition of 'Dealer' as defined under Clause-2(4) which means a person who carries on the business of purchase, sale, storage for sale or manufacture of any essential articles and includes his representative or agent, whether for commission, remuneration or otherwise carries such business. Inter alia it is also submitted by the learned Advocate General that even if a person engaged in grinding wheat to get flour, such activity is very much an activity of manufacturing as per ordinary concept and considering the above fact, the petitioner association is duty bound to carry out the instructions. According to the learned Advocate General, the activity of the petitioner

association and its members falls within the definition of 'Dealer' as above. It is also submitted that action taken in furtherance of implementation of directive principles of State policy as contained in Article 47 which cast duty upon the State for raising level of nutrition amongst the women and children, efforts must be made and when every year in the country, more than 24,00,000 children die and 1,32,000 mother also succumb to death because of deficiency of iron and folic acid, such measures taken by the State Government to eradicate anemia and remove deficiency needs to be viewed by this Court with circumspection.

10. In short, it is submitted by the learned Advocate General that the above aspects of the policy decision needs no interference by this Court in exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India.

11. With regard to the contention of violation of provisions of provisions of the Drugs and Cosmetics

Act, 1940, it is submitted by the learned advocate General that mixing powder of iron and folic acid cannot be said an activity of manufacturing or selling drugs by the members of the petitioner association. Not only that but as per Section 3(b) and also Section 3(b)(iv), where iron and folic acid will not be covered under the definition as above. According to the learned Advocate General, no prescription of medical practitioner is required and no license is necessary under Section 18 of the Act and therefore, no penal action can be taken by the concerned authority under Section 27 of the Act.

12. Learned advocate General has further submitted that even if cost factor is considered then also the members of the petitioner association will have to mix only very small quantity of iron and folic acid in the wheat for fortification and that comes to 1.5 grams per quantity of 10 kilograms of Atta. The price will be not more the 10 paisa per kilogram which can be subsequently born out by the customer and the cost can be rolled over in the

charges prescribed by the Attachakki owners. Learned Advocate General has denied that the instructions given are not to help Nikolas Piramal Pharmaceutical Co., since other four companies are also in the market who can supply the requirement of iron and folic acid and in case of difficulty in getting smooth supply of such nutrients, the members of the petitioner association can always represent to the Government and in case any hardship, same can be looked into by the State authorities.

13. Having heard learned counsels appearing for the parties, perusal of the records including relevant affidavits and additional affidavits filed by the respective parties and statutory provisions of the Gujarat Essential Articles Dealers (Regulation) Order 1977 and Drugs and Cosmetics Act, 1940 and Rules made there under, I am of the opinion that contentions of the petitioner that impugned circular and orders are violative of the above Order and Act are misconceived. It is true that no where in the pleadings it is mentioned by the

petitioner that association of the petitioner is registered under which statute, nor list of enrolled members of the association is provided. However, considering the nature of controversy involved in this petition, it is dealt with on merits.

14.If definition of 'Dealer' as given in Clause 2(4) of the Order of 1977 perused, it reads as under:

> ""Dealer" means a person who whether for commission, remuneration or otherwise and whether or not in conjunction with any other business, carries on the business of purchase, sale, storage for sale or manufacture, of any essential articles and includes his representative or agent, but does not include-
>
> (a) for the purpose of all clauses except Clauses 3 and 4 of this order a person in relation to any essential commodity in respect of which he holds or is required to hold a licence or as the case may be, an

authorisation under any order for the time being in force, issued by the State Government under Section 3 of the Essential Commodities Act, 1955.

(b) an agriculturist who stores and sales essential articles produced by him by personal cultivation and does not engage in the business of purchase, sale or storage for sale or any essential articles not produced by him by personal cultivation;

(C) a hawker of a pedlar;”

15. And even schedule-I to the order of 1977 as attached as per Clause-2(5) of the very order is read, at numbers 1 and 9 of Clause A, names are given and they are wheat and Atta.

16. Thus, the members of the petitioner association are grinding grains, particularly wheat and by the process of grinding wheat is converted into flour and therefore, the Attachakki owners can be brought

within purview of definition of dealer. Not only that but members of Attachakki owners store food-grains and they also sell Atta of different grains and therefore also they are dealers and issuance of circular and orders for registration with the authority under the Order of 1977 and direction to mix powder of iron and folic acid by the authority pursuant to the careful study undertaken so as to enhance level of nutrition amongst the people at large as a part of policy decision does not require any interference by this Court in exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India, since such exercise of power by the authority do not violate any provisions of law and at the same time it cannot be said to be violative of Article 14 and 19(1)(g) of the Constitution of India.

17. Another contention of the learned advocate for the petitioner with regard to the violation of the provisions of Drugs and Cosmetics Act, 1940 and Rules there under, the definition of 'Drug' as defined under Section 3(b)(i) and 3(b)(iv)

reproduces as under:

“3(b)(i): all medicines for inter or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes.

3(b)(iv): such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of decease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board.”

17.1 Above definition of the Act is to be interpreted along with the provisions contained in Section 18 of the Act and Pare-VI of The Drugs and Cosmetics Rules 1945 which is pertaining to sale of drugs other than homeopathic medicines and Rules 59

to 65 contained therein.

18.So far as Section 18 of the Act of 1940 is concerned, it prohibits manufacture and sale of certain drugs and purchasing powder of iron and folic acid by the members of the petitioner association cannot be said to be purchase of drug and mixing the same with Atta for fortification also cannot be said to be a sale or distribution of drug. No prescription of registered medical practitioner is necessary for purchasing the above nutrients and therefore, penalty envisaged under Section 27 of the Act with regard to manufacture, sell etc. of drugs in contravention of the chapter is not attracted. Therefore, apprehension of the petitioner about violation of provision of the Act of 1940 is also not justified.

18.1) Even considering the definition of Section 3(b) and Section 3(b)(iv) of the Act, if seen any juxtaposition with Schedule-H framed under Rules 65 and 97 of the Drug Rules of 1945, nowhere prescribed folic acid and iron as prescription

drugs. Only item no.260 of the said schedule with regard to iron preparation for parenteral use and admittedly mixing powder of iron and folic acid is not for iron preparation and parenteral use.

18.2) So far as Section 3(b)(iv) of the Act is concerned, it is about 'device' intended for internal or external use and as per Central Government notification dated 6/10/2005, certain device are specified, which do not include folic acid or iron as 'device'. Thus, considering the above aspect, the contention that directions of the respondent authorities made in this petition are violative of the provisions of the Drugs and Cosmetics Act, 1940 and Rules made there under cannot be accepted and fail.

19.So far as the respondent-authority is concerned, precautionary measures to be taken by the members of the petitioner association for usage of mixture of iron and folic acid are already specified, so that the above nutrients do not get contaminated and no harm cause to the person mixing the powder

of iron and folic acid. In above view of the matter, adequate safeguards exceeds for hygiene and health of members of the petitioner association as well the public at large.

20.If the object for which the circular and directions are issued by the respondent-authority are perused, before issuance of such direction, in depth study and survey were carried out at the behest of WFP in the matter of wheat flour (Atta) fortification and thereafter, as a result of the above study and survey, WFP reached following conclusions:

(a) Anemia is very high in Gujarat, affecting on average 50% of the most vulnerables.

(b) Consumption of Atta at village level is estimated at 2,500,000 Mt per year in Gujarat, which represents 95% of the state consumption of Atta (equivalent to 200g/pers/day in the rural areas).

(c) Fortifying Atta with iron, folic acid and possibly vitamin C will cost 10 paise per kg of

fortified Atta, which includes inspection, control, and monitoring, as well as research and development.

(d) Wheat market price is IRP 10.00 , grinding cost is IRP 1:00, and then total fortification costs will represent only 1% of the cost of kg. Atta.

(e) Either the total cost of fortification has to be borne by the final consumer (i.e. 10 paise/kg. Atta), and out of th total cost 4 paise are kept by the miller a an incentive; or the final consumer pays only for the fortificant (i.e. 6 paise/kg Atta). In any case, to ensure the sustainability of the programme, the consumer should pay for the fortification.

(f) If the Government of Gujarat agrees with the adjustments and suggestions proposed in the present report, it is recommended to support the fortification programme at village level. WPF's participation should be through the funding of a pilot phase for 6 months.

21. Considering the above aspect what is decided by the State authority is to direct Attachakki owners

to mix the powder of iron and folic acid of negligible quantity i.e. only 1.5 grams in 10 kilograms of wheat flour and cost of which will be not more than 10 paisa which can ultimately be rolled over to the consumers and the members of the petitioner association will not be saddled with any additional financial burden. Besides the Government has taken adequate care to see that a supply of iron and folic acid be made easily available to the members of the petitioner and for that purpose not only Nikolas Piramal Pharmaceutical Co. is the distributor but other four companies are also in the market from where the petitioner can avail the above nutrients. In other districts like Banaskantha, Sabarkantha, Surendranagar, Dang and Mehsana, members of Attachakki owners have decided to carry out the above policy of the Government and no objections have been raised. In such scenario, the objection of the members of the petitioner about favouring a particular company or exercise of power by the authority in unfair manner cannot be accepted.

22.Even as reflected in the additional affidavit filed by the Additional Secretary, Food, Civil Supplies and Consumer Affairs Department of State of Gujarat it is revealed that:

“The Hon'ble Supreme Court passed an order in Writ Petition (Civil) No.196 of 2001 constituting the Central Vigilance Committee to be headed by the former Judge of the Hon'ble Supreme Court, Hon'ble Mr.Justice D.P.Wadhwa, to be assisted by Mr.N.C.Saxena, Commissioner earlier appointed by the Hon'ble Supreme Court to look into the modalities affecting the proper functioning of the Public Distribution System and to suggest remedial measures. The following observations of the said Committee with reference to the subject matter o the present petition are worth referring to:

INTRODUCTION O FORTIFIED ATTA (WHEAT FLOUR) IN THE PUBLIC DISTRIBUTION SYSTEM

The Committee is of the considered view that fortified Atta along with wheat should be made available through PDS outlets which would immensely benefit the vulnerable sections of society and increase off take by consumers of PDS foodgrains. Even today, persons without BPL ration cards, despite being eligible for

> the same, and other persons with BPL ration cards are purchasing wheat flour from the open market as a matter of convenience and to save on the time and cost involved in grinding of wheat into flour. The system of distribution of wheat flour is in vogue in the district of Darjeeling where enriched wheat flour is given @ Rs.6.80 per kg. Costs anything up to Rs.150/- and therefore, it should be possible to price a packet of fortified 5 kg or 10 kg wheat flour at a much lower price which may be any price between Rs.7/- and Rs.8/- per kg. This will definitely be much less than what may be available through the open market. The advantages would far outweigh a somewhat increased price that may have to be paid. At least, providing this option to the vulnerable sections of the society though the PDS network will be a step in the right direction.
>
> The Committee has also suggested modalities for operationalising this innovative step in the main chapter dealing with this subject.
>
> Fortified Atta would also improve the general health of the vulnerable sections and reduce instances of Vitamin A deficiency and iron deficiency Anaemia. It has also been suggested that general instructions may be given to sell only fortified Atta both under the PDS as well as the open market as this will make implementation easier and prevent diversion."

23. Therefore, directions of the respondent authorities to the members of the petitioner association to mix iron and folic acid in the flour to implement above suggestions cannot be said to be illegal, arbitrary or unreasonable and violative of Article 14 and 19(1)(g) of the Constitution of

India.

24.Even the efforts of the State authority of food fortification scheme to tackle malnutrition in the people of the State is carried out and other States have also decided to follow such scheme. In that view of the matter, the apprehension shown by the members of the petitioner association to cause any damage to their business or trading activity is ill founded. The reliance placed on the decision of the Hon'ble Apex Court in the case of **Municipal Council, Ratlam v. Vardhichand, reported in (1980) 4 SCC 162**, is not helpful to the petitioner, since the members of the petitioner are not to bear any additional cost for providing this facility by adding or mixing the nutrients namely iron and folic acid, since the same can be rolled over to the consumers.

25.Considering the overall aspects, no case is made out by the petitioner association for interfering with the policy decision of the State authority and the impugned circular dated 26/7/2006 along with

letters/orders dated 8/1/2007 and 9/1/2007 issued by the respondents concerned cannot be said to be unreasonable, arbitrary or unjust in any manner so as to be violative of Article 14 ad 19(1)(g) of the Constitution of India.

26.Therefore, petition fails. Notice stands discharged. No order as to cost.

(ANANT S. DAVE, J.)

(ila)